93-238

No. _____

Supreme Court, U.S.
FILED
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**In The**

# Supreme Court of the United States

October Term, 1993

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JACK GERRITSEN,

*Petitioner,*

v.

CITY OF LOS ANGELES, et al.,

*Respondents.*

♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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Petitioner, Pro Se
6217-1/2 Palm Avenue
Bell, CA 90201
(213) 560-4318
*Counsel of Record*

VAILLETTE BRIEF PRINTING SERVICE • (714) 536-9366

## QUESTIONS PRESENTED

A. Whether a municipality has created public fora open to all constitutionally protected speech when it allows words:

(1) to be displayed on banners hung from utility poles, that announce events "in a civic and public interest";

(2) to be spoken in a civic auditorium if those words are not political;

(3) on literature to be distributed in public parks when they are not in "bad taste" or "impact negatively on the city";

(4) to be displayed in the public right of way if they are commercial "real estate" signs.

B. Whether a municipality may constitutionally:

(1) prohibit the distribution of leaflets within blue lines painted on the surface of the ground of a public park;

(2) require persons who would distribute leaflets outside those blue lines to obtain a permit to do so;

(3) require persons who are not city sponsored to pay a fee and obtain insurance to give a speech from a bandstand in a public park;

(4) require persons to submit an audio tape recording prior to granting permission to communicate in a public amphitheater.

## PARTIES TO THE PROCEEDINGS

The petitioner is Jack Gerritsen.

The respondents are:

City of Los Angeles,
Jerry Smart,
William Vestal,
Kathy Herbert,
Maureen A. Kendal,
Edward Longley,
Dave Torres,
Mike McKelvey,
Caroline Ascencio,
Bacerra, Aguirre, Mendoza, Peel
Dominguez, Young

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JACK GERRITSEN,

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v.

CITY OF LOS ANGELES, et al.,

*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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The petitioner, Jack Gerritsen, respectfully prays that a writ of certiorari issue to review the May 14, 1993 judgment and opinion of the United States Court of Appeal to the Ninth Circuit affirming in part and reversing in part the judgments of two District Courts.

## Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit entered on 14 May 1993 will be reported at *Gerritsen v. Los Angeles*, 994 F.2d 570 (9th Cir. 1993). The slip opinion is reprinted in the appendix hereto at p. 1 *infra* ("App.").

Findings of Fact and Conclusions of law in case number 87-1861-WMB of the United States District Court, William Mathew Byrne, Jr. Judge, entered on 28 February 1991 is reprinted in the App. p. 28. The judgment is reprinted at App. p. 33.

Findings of Fact and Conclusions of Law, Judgment in case number CV 89-6026-WJR, United States District Court, William R. Rea Judge, entered on 18 December 1991 are reprinted at App. p. 34.

## Jurisdiction

Petitioner invoked federal jurisdiction under the First Amendment and Fourteenth Amendments to the United States Constitution and federal statute 42 U.S.C. § 1983.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgments in both cases. No petition for rehearing was sought.

Jurisdiction to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions

The constitutional provisions involved in this case are the First and the Fourteenth Amendments to the Constitution of the United States. The statutory provision involved is 42 U.S.C. § 1983.

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment to the United States Constitution, section 1, provides in part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."

42 U.S.C.S. § 1983 (Civil Action for deprivation of rights) provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## Statement of the Case

Petitioner filed complaints in the District Court in 1987 and 1989. Both cases alleged a conspiracy to deprive of First Amendment rights of speech/press by persons employed by or agents of respondent City of Los Angeles through a variety of violent and non-violent means.

In each case a bench trial was held and judgments were entered for defendants-respondents. On appeal the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part and remanded for a determination of damages against respondent.

In the Court of Appeals opinion at footnote 8 (App. p. 10) the court recognized that petitioner had made both a facial and as applied challenges to the policies of respondent but the court found for this petitioner only on his as applied challenge to respondent's policy of prohibition of the distribution of printed materials in parts of El Pueblo Park and respondent's policy of requiring a permit to distribute in the remaining sections of El Pueblo Park. In all other "facial" and "as applied" claims, as alleged in the two complaints in the two cases, and in the "Questions Presented" herein, the District Courts' findings for respondent were affirmed including the facial challenge to the regulations on the distribution of leaflets in El Pueblo Park, which have not been repealed and are still in effect with respect to all persons except this petitioner.

## A. THE RESPONDENTS HAVE OPENED PUBLIC FORA.

(1) Street Banners.

Since 14 September 1936 the respondent City of Los Angeles has permitted the display of street banners through its Department of Public Works, Street Use and Maintenance Division. The banners, if a permit is issued, may be hung either from a single utility pole or across streets between opposing utility poles.

In 1986 petitioner applied for 33 permits to display such street banners on forms supplied by the respondent City of Los Angeles ("City").

Among the proposed messages were:

(a) "PEACE ON EARTH, GOOD WILL TO MEN"
(b) "MERRY CHRISTMAS"
(c) "MEXICO WORLD CLASS DRUG PUSHER"
(d) (an empty banner with no wording)

Subsequent to petitioner's initial requests the city informed petitioner that the Board of Public Works had adopted an amendment to the rules governing street banners which stated that only banners for publication of community charitable or non-profit events which serve a civic and public interest will be permitted.

(The adopted rules were Ex. 140(b) at trial, and pages 56-62 within the Excerpts of the Record on appeal.)

On 17 September 1986 petitioner submitted three additional applications for the display of street banners that would have displayed the following words:

(Complaint in case number 87-1681)

(a) "STOP U.S. WAR IN CENTRAL AMERICA RALLY NOV 29 CITY HALL, Fall Mobilization on Central America";
(b) "VIVA LA REVOLUCION 20 Nov, Park Mexico";
(c) "MERRY CHRISTMAS, Dec. 25, 1986."

In February 1988 and on 14 April 1988 petitioner made additional requests to display a banner: "MEXICO WORLD CLASS DRUG PUSHER." In response to the later request the City on 28 June 1988, in an Inter-Departmental Correspondence, indicated that the Board of Public Works had previously denied an identical copy request and that petitioner has been notified that this requests-applications have been forwarded to the Office of the City Attorney for consideration.

No permit has been granted on any of petitioner's applications for display of any street banners.

(2) A Civic Auditorium

In October of 1989 petitioner requested of the City that he be allowed to used a municipally owned auditorium known as Barnsdall Gallery Theater for a political event and he was informed orally and then was sent a copy of "Guidelines For Rental" which indicated that:

> "The Gallery Theater may not be used by a group, person or organization for any political or fundraising activities."
> (Plaintiff's Exhibit 135 at trial, P. 49-42 Excerpts of Record)

Those guidelines also indicate that "Rental may be denied

if the content of the program is deemed unsuitable by the Department." (Emphasis added.)

(3) Distribution of Literature in Public Parks Near Los Angeles City Hall

On 9 May 1988 respondents issued an Inter-Departmental Correspondence (Exhibit 98 at trial, P. 39 Excerpts), which formalized in writing the City's guidelines on the distribution of literature in public areas around City Hall.

Those guidelines to "All Security Personnel" instructed police officers in the employ of the City to only "interfere" with such distribution if the literature among other criteria, ". . . is in bad taste" or "impacts negatively on the City of Los Angeles" or if there are any "Complaints to Security by the public regarding such activity."

Security personnel who read those guidelines understood that in following them they should investigate persons distributing literature in parks near the City Hall within their jurisdiction and detain such persons, and for their own safety and for the safety of the detainee handcuff such persons being investigated if they determined that his literature fell within one or more of the classifications that warranted interference, and if warranted transport such distributors to security offices within City Hall for further investigation.

Pursuant to that policy on 28 April 1988 petitioner was detained while passing out literature and ordered to leave the area and ordered not to return and hand out leaflets or he would be cited for trespassing.

Pursuant to the written guidelines, on 7 August 1989 petitioner was detained, handcuffed and transported to security offices during which time he was subjected to painful and unnecessary twisting of his left thumb, photographed and released on orders not to return or complain to supervisors.

Pursuant to the written guidelines, on 15 September 1989 petitioner was detained, handcuffed and transported to security offices in City Hall to again prevent his distribution of leaflets in public areas near Los Angeles City Hall that met one or more of the criteria specified in the guidelines.

In none of those seizures of this petitioner was he brought before a magistrate to answer for any criminal charges, nor were any criminal charges ever filed against petitioner.

(4) Posting of Signs in the Public Right of Way

On 20 August 1990 petitioner was notified in writing to appear at City Hall at 11:00 a.m. on 31 August 1993, "to show cause why further legal action should not be taken for failure to remit payment" . . . "for non compliance with L.A.M.C. Section 28.04(a)." (Plaintiff's Exhibit 151, P. 66 Excerpts)

Real estate signs are specifically exempted from the enforcement. (Plaintiff's Exhibit 150, P. 65 Excerpts)

**B. THE RESPONDENTS HAVE CLOSED PUBLIC FORA.**

(1) Inside Designated Areas of El Pueblo Park

On 11 August 1983 the City formally enacted and put into writing its policy forbidding the distribution of printed materials in some out of door areas of El Pueblo Park.

The Circuit Court opinion found those guidelines as applied to this petitioner to have violated his First Amendment rights without reaching the issue of the facial unconstitutionality of the policy. (Footnote 8, App. p. 10)

(2) Outside Designated Areas of El Pueblo Park

On 11 August 1983 the City formally enacted in writing a pre-existing policy that forbids the distribution of printed materials in all areas outside the absolutely forbidden area, without obtaining a permit to do so from the park director.

The Circuit Court opinion found that petitioner's First Amendment rights were violated by such policy but failed to reach the constitutionality of the policy itself which is still in effect, and the court below found that it has not been repealed. (App. p. 6) (also see footnote 8, App. p. 10)

(3) On Bandstand (Kiosko) in El Pueblo Park

On 23 June 1988 the City responded to petitioner's request to use the bandstand in El Pueblo Park for expressive activity which stated that:

> "Outside groups using kiosko rent it and provide insurance. No others permitted. We have waived fees for community oriented and our scheduled entertainers."
> (Plaintiff's Exhibit 3, P.30 Excerpts.)

On 19 July 1988 the park director further responded to petitioner that he must pay fees and provide insurance in the amount of not less than $1,000,000.00 and that "I deem it reasonable to require that you obtain such insurance." (Plaintiff's Exhibit 4, P. 31 Excerpts.)

Petitioner has not paid any fees and did not obtain the insurance. Between 19 July 1988 and 21 May 1989 park security officers ordered petitioner on several occasions to leave the bandstand. On 21 May 1989 two Los Angeles police officers ordered petitioner to turn off his public address system near the bandstand and later two other Los Angeles police officers handcuffed petitioner as he was speaking in the park. As a result of that seizure-arrest, petitioner was arraigned on charges of trespassing upon the bandstand, but the charges were dismissed.

(4) Prior Restraint of Speech at Triforium

On 22 September 1989 the City responded to petitioner's request to use the Triforium amphitheater in a park near Los Angeles City Hall with the indication that:

> "If you wish to obtain a permit for use of the site contact the City's Department of General Services which has jurisdiction over the site. If you are interested in performing, we ask that you send an audition tape, which is standard procedure . . ." (Plaintiff's Exhibit 111, P. 44 Excerpts.)

On 13 October 1989 the City's Department of General Services responded that to use the "Triforium area" . . . "we are unable to grant permission unless you are a performing artist with a taped recording of your

performance approved by the Cultural Affairs Department."

That same response from the City indicated that to distribute leaflets on the First Street Lawn " . . . you may do so at no cost whatsoever and without formal permission . . ." However, to give a speech to persons at a "rally" petitioner was required to pay $17.00 per hour, minimum four hours, and obtain liability insurance. (Plaintiff's Exhibit 114, P. 45 Excerpts.)

## REASONS FOR GRANTING THE WRIT

In this case the City, two United States District Courts and the United States Court of Appeals for the Ninth Circuit have acted contrary to the law as revealed in cases decided by this Court and in violation of a fundamental human, civil, and constitutional right to use words in public places, streets and parks of the City of Los Angeles and by extension, if their rulings are allowed to stand, in all public places in all cities.

The importance of the decisions of the courts below is extreme. If those decisions are not reversed, every city will be able to censor written and spoken words in "designated" public fora, where only communications that are "*announcing events* in the civic and public interest" (9th Cir. Op. at App. p. 19) are permitted. And every city will be able to adopt a regulation on signs in the public right of way which ". . . excludes all noncommercial signs, making it neutral as to political views." (Emphasis in the original at App. p. 22.)

Nearly every city in the nation has a policy on how they respond to requests to display messages in the public right of way and specifically on requests to use utility poles to display a message.

In Southern California, three cities were sued by petitioner regarding their denial of permission to display political messages on street banners. This Court in its decision in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L.Ed.2d 772 (1984) limited municipalities to only two possible constitutional responses to requests to display messages on such street banners. This Court reversed a panel in the 9th Circuit (opinion of Circuit Judge Dorothy W. Nelson) and found that utility poles are not a traditional public forum and therefore the poles may " . . . be reserved by the state 'for its intended purposes communicative or otherwise as long as the regulation is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view,'" (*466 U.S. 815*) as long as the regulation is viewpoint neutral and content neutral. This Court found that Los Angeles' complete ban on posting on utility poles and other objects in the public right of way, within Los Angeles Municipal Code Section 28.04, served a significant state interest of advancing esthetic values and reducing visual clutter and that in Los Angeles " . . . there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance." (*466 U.S. at 804*)

Therefore Los Angeles and all cities have only the two choices of either allowing the display of speech or prohibiting that display on utility poles, but clearly they may not censor based upon the content or viewpoint by allowing some and prohibiting others.

However, since *Vincent* in 1984, Los Angeles has adopted a regulation pursuant to its Municipal Code Section "62.132, STREET BANNERS" (which allows for permits for the display of banners over the street from pole to pole and for banners affixed to and supported by only one pole). The regulation states that:

> "Banner permits shall only be issued for events which serve a civic and public interest . . ." (Plaintiff's Exhibit 140(b) at trial, P. 57 Excerpts.)

When the respondent in this case, City of Los Angeles, filed Appellants' Reply Brief in *Vincent*, *supra*, they argued at page 11 that:

> "The banners which the City permits to span over the center of its streets (Municipal Code Section 62.132) are an entirely different 'forum' from signs posted on the devices enumerated in Section 28.04."

and at page 2 of that reply brief Los Angeles stated that:

> " . . . the city permits the erection of street banners . . . provided that strict requirements for erection of the banners are met . . . Indeed these banners provide precisely what the appellees seek: a place in the public domain where they may display their messages."

Since that admission by Los Angeles that taxpayers for Vincent could have displayed their messages on utility poles if only they had applied for a permit under Municipal Code Section 62.132 and met the physical and safety requirements of erection, Los Angeles has enacted regulations giving them the power to judge whether applicants' messages fall within the content

requirement of "announcing events in the civic or public interest" and have found that petitioner's proposed messages announcing the events of:

(a) "STOP THE U.S. WAR IN CENTRAL AMERICA RALLY Nov 29 CITY HALL, Fall Mobilization on Central America";
(b) "VIVA LA REVOLUCION 20 Nov, Park Mexico";
(c) "MERRY CHRISTMAS Dec. 25, 1986."

can be denied, and the Ninth Circuit has agreed. In this case in which Circuit Judge Dorothy W. Nelson again wrote the opinion for the panel of judges, the City's censorship was held to be constitutional. If that opinion is not reversed, then all municipalities may follow Los Angeles and enact procedures which allow them unbridled discretion in deciding which requests to grant and which to deny in a two step process.

First, a city sets vague and broad guidelines as to what should be permitted, and then someone is given the authority to decide which requests fall within or without those guidelines. The result is that cities are allowed to designate what words are exposed to the public on public streets.

The Ninth Circuit denied petitioner's claim as none of his applications "announced events of any sort . . . but express political beliefs or greetings," (App. p. 19) The courts below did not recognize "MERRY CHRISTMAS, HAPPY NEW YEAR" as being a qualifying event in the civic or public interest, and did not notice the obvious political events proposed and noticed in the complaint filed in the District Court (a,b,c, on this page) as being in the civic or public interest. Is there any way for anyone, including municipal

authorities, to know whether an announcement "Taxpayers for Vincent" must now be permitted?

The answer was suggested but not followed by the Ninth Circuit opinion in this case at footnote 8. (App. p. 10) where that court cited *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988) for the rule that when a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity such statute is unconstitutional. The appalling alternative to a declaration of unconstitutionality of the municipal policy is that every individual message that is disputed as whether it is in the public interest or not, must be brought to court for a decision. The courts must not be burdened with this task. Rather, this Court must compel all courts to adhere to the mandate of *Vincent, supra*, which is that a city may allow, or prohibit messages on utility poles, but cities may not act as censors.

Petitioner also has a constitutional claim in that he was cited for violation of the *Vincent* Municipal Code Section 28.04 which the Ninth Circuit opinion (App. p. 22) found to ban "all signs on its property except real estate signs" and that "The regulation excludes all *noncommercial* signs, making it neutral as to political views."

## I. COMMERCIAL v. POLITICAL MESSAGES IN A PUBLIC FORUM

The Circuit court is in clear error and in direct conflict with this Court in allowing a municipality to ban all political and allow commercial (real estate) signs in the public right-of-way.

In *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L.Ed.2d 800 (1981), this Court at 506 stated that:

> "The extension of First Amendment protections to purely commercial speech is a relatively recent development in First Amendment jurisprudence. Prior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment. *Valentine v. Christensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L.Ed. 1262 (1942)"

*Metromedia* also held that:

> "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.* 447 U.S. at 538, 100 S. Ct. at 2333, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in the judgment)."

For this Court to allow a city to decide which street banners are in the civic or public interest, clearly allows the government control over the search for political truth.

In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 345 (1976) this Court elevated the degree of protection to commercial speech, but did not equate the two, but expressly indicated the contrary. See *id*, at 770-773 and n. 24, 96 S. Ct. at 1830-1831. See also *id*, at 779-781, 96 S. Ct., at 1834, 1835 (STEWART, J.,

concurring).

After an exhaustive analysis of comparative protections to commercial and noncommercial speech, this Court in *Metromedia, supra*, analyzed the facts in that case under the four prong test applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980). No such four prong test has ever been required of political speech in any forum. Even if no preference were ever to be accorded political speech, there is absolutely no basis for ever granting a preference to commercial speech in a public forum. The Circuit court below has gone even further than that in this case, by affirming that municipal authorities may allow commercial signs and exclude all noncommercial signs in the public right of way.

The Circuit court below cited *Vincent, supra*, 466 U.S. at 815 as upholding the city's regulation as "viewpoint neutral, narrowly drawn to serve a legitimate government purpose, and leaves open other channels of communication." (App. p. 22)

The regulation granting commercial and denying political speech is arguably viewpoint neutral, but certainly it is not content neutral. The court cited no governmental purpose in the prohibition of political speech and the allowing of commercial speech and there certainly are no adequate alternative channels of communication available.

## II. ALTERNATIVE CHANNELS OF COMMUNICATION

Although the Circuit court below found a "myriad of other expressive opportunities to those wishing to express their noncommercial views" (App. p. 22) the court had prior to that finding in this case admitted that petitioner was unconstitutionally prohibited from the distribution of leaflets in some areas of a public park and unconstitutionally denied permits to distribute in all other areas of a public park, and that the City could not be required to allow petitioner to put his messages on street banners, and that as a non-City sponsored speaker he could be required to post fees and insurance to speak from a public bandstand, and that the City cannot be compelled to allow petitioner to give a political speech in a municipal auditorium, and that he had never applied for use of the Triforium stage as he had never submitted an audio tape for review by municipal authorities, and that he could be detained and handcuffed pursuant to a City policy that allowed interference if leafletting distributed in other public parks near City Hall were in bad taste or impacted negatively on the City, and as to posting a noncommercial sign, he could be held in violation of Municipal Code Section 28.04. The only alternative to the written and spoken word apparently available in Los Angeles may be flag burning, as allowed by this Court in *Texas v. Johnson*, 491 U.S. 414, 491 U.S. 397, 109 S. Ct 2533, 105 L.Ed.2d 342 (1989).

Based upon *Vincent, supra*, (1984) petitioner could have reached the conclusion that he had an alternative public forum (street banners) and upon the assertion of Los Angeles that Vincent could have applied for and received a permit to use a street banner on a utility pole. But that option has been closed to petitioner.

Also, the availability of an alternative forum argument of *Vincent, supra*, appears to directly contradict this Court's ruling in the preceding term in *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 70, n. 15, 103 S. Ct. 2875, 2882, n. 15, 77 L.Ed.2d (1983):

> " . . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (citing *Schneider v. State of New Jersey*, 308 U.S. 147, 163, 60 S. Ct. 146, 151, 84 L.Ed. 155 (1939).

In *Knights of K.K.K. v. East Baton Rouge Parish School Board*, 528 F.2d 1122, 1126, the court found that the K.K.K. could not be denied access to school facilities on the basis that other facilities for holding meetings were available.

And very recently in *Lamb's Chapel v. Center Moriches Union Free School District*, _____ U.S. _____, 113 S. Ct. 2141, ____ L.Ed.2d ____, 7 June 1993, this Court found that a school district must allow a religious group to use school facilities even though other facilities were available.

## III. DESIGNATED PUBLIC FORUM

Although utility poles on public streets do not have the intended purpose of display of messages and a city may reserve them for that purpose under this Court's ruling in *Vincent*, the City has now opened the forum to all protected speech by allowing that Vincent could have posted his campaign posters on "street banners," and by allowing that anyone may display a message on such

banners meeting the physical and safety requirements of the code section, notwithstanding the City's civic or public interest requirement.

A designated public forum enjoys the same protection, once it is opened, to speech as traditional public fora. Recently this Court in *Intern. Soc. for Krishna Consciousness v. Lee*, ____ U.S. ____, 113 S. Ct. 2141, ____ L.Ed.2d ____ (1992) reaffirmed *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L.Ed. 567 (1985) in the "forum based" approach to assess restrictions that government places on the use of its property.

Under that approach traditional public fora are subject to the highest scrutiny. The second category of public property is the designated public forum, whether of limited or unlimited character--property that the state has opened for expressive activity. Regulation of such designated public fora is subject to the same limitations as that governing a traditional public forum where regulations survive only if they are narrowly drawn to achieve a compelling state interest.

In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983), this Court in discussing the second category of designated public forum found that: (460 S. Ct. 955)

> "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum," citing *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L.Ed. 440 (1981)l. (Content based prohibition

impermissible at university meeting facilities, where making those facilities available to student groups provided clear evidence of an intent to create a public forum.)

In this case the City has not indicated or declared that any of the fora contested are a "designated" public forum or public fora in any way, shape or form. The City has limited speech/press in all of them in a variety of ways. But a forum does not enter the second category of designated public forum based upon the intent or declaration or affirmation of the state. The courts must look to the policy and practice of the government to ascertain the nature of the forum and must examine the nature of the property and its compatibility with expressive activity. See *Cornelius, supra,* (473 U.S. 788, 802).

All of the fora in contest here are compatible with expressive activity and indeed the respondents have permitted expressive activity, however restricted, in each of them.

Respondent City of Los Angeles has opened the forum of street banners on utility poles by permitting announcements of events in a civic and public interest (whatever that means) and at least since filing their brief of appellants in *Vincent, supra,* they can hardly refuse the political message/speech indicating "Taxpayers for Vincent."

All cities that allow the display of street banners from utility poles must, in accordance with this Court's decision in *Vincent* must allow anyone including this petitioner to display any message otherwise protected by the Constitution. Although the First Amendment does

not protect obscenity, (See *Roth v. United States*, 354 U.S. 426 (1957), defamation (See *Beauhanais v. Illinois*, 343 U.S. 250 (1952), or fighting words (See *Shaplinsky v. New Hampshire*, 315 U.S. 568, none of petitioner's requested words are obscene, defamatory, or fighting words within the meaning of those decisions.

The fact that the City has opened the fora to certain groups or some speech does not allow them to close it to other types of speech based upon the content of the proposed speech.

This Court in *Lamb's Chapel, supra* (1993), held that a school district could not deny use of facilities for religious or church purposes and rejected the arguments that even in a limited public forum the government may limit subject matter to;" . . . the interests of the public in general rather than sectarian or other private interests" and rejected permitting only uses which are; "social, civic . . . and other uses pertaining to the welfare of the community."

Therefore there is no basis for this City or for any city to allow only speech which is "social," "civic," or "in the public interest, or which announces "an event," in a forum they have opened, willingly or not, as a "designated" public forum.

As this Court stated in *U.S. v. Kokinda*, 497 U.S. 720, 110 S. Ct. 3115, 3119, 111 L.Ed.2d 571 (1990):

> "Regulation of speech on property that the government has expressly dedicated to speech activity is also examined under strict scrutiny."

## IV. COMPELLING STATE INTEREST

In this case the Circuit court found that government restrictions on speech must be (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave ample alternatives of communication. (App. p. 14) and found that the ban on leaflets in the park was content neutral because "it prohibits all handbills without regard to their content." Under that erroneous theory municipalities may ban all leafletting in public parks as the ban is content neutral, as long as it is not directed to a particular individual.

The Circuit court also found that there were alternative channels of communication because "presumably, he could use methods other than handbills to express his political views" and found only one reason offered by the City for the leaflet ban in the park was to " . . . make it more difficult for Gerritsen to distribute handbills regarding his political beliefs" (App. p. 17) and found that reason-interest not to be a non-compelling state interest.

The respondent City of Los Angeles can offer no legitimate interest in not permitting speech on street banners which are not in the civic or public interest, or not permitting protected speech in any of the fora in contest in this case.

Moreover, the motive for legislation is not relevant. This Court has specifically rejected the argument that:

> "Discriminatory . . . treatment is suspect under the First Amendment only when the legislation intends to suppress certain ideas."

*Simon & Schuster v. Members of New York State Crime Victims Board*, ____ U.S. ____, 112 S. Ct. 501, 509, 116 L.Ed. 2d 476 (1991).

If the motive of making it more difficult for Gerritsen to distribute handbills is the only essential element for finding the respondents' acts unconstitutional, then no person could have been successful in a challenge to the City other than this particular petitioner and that policy will continue to be enforced against all other persons.

## V. STANDING/JURISDICTION

The Circuit court below has ruled on various other claims by this petitioner, finding that he has no standing, or the court has no jurisdiction as petitioner has not applied for a permit to use various public facilities, or did not complete an application to use a forum.

This Court has consistently ruled that a person may facially challenge a scheme that grants overly broad discretion to authorities in First Amendment cases, without first applying for and being denied a permit. (See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138 at 2143, 100 L.Ed.2d 771 (1988))

In *Lakewood* this Court stated:

"A court may invalidate an excessively broad grant of discretion on its face, without regard to the particular facts of the plaintiff's case, because the very existence of the discretion lodged in the public official is constitutionally unacceptable."

*Fernandez v. Limmer*, 663 F.2d 619, 625 (5th Cir. Unit A 1981) *cert. denied*, 458 U.S. 1124, 103 S. Ct. 5, 73 L.Ed.2d 1395 (1982).

Facial challenges "have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker." *FW/PBS, Inc. v. City of Dallas*, 493 U.s. 215, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990).

One has standing to challenge a statute or scheme, "on the ground that it delegates broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S. Ct. 735, 737, 13 L.Ed.2d 649 (1965). (Emphasis added.)

The respondent City of Los Angeles has overly broad discretion when guided by the vague "in the civic or public interest" in deciding whether to grant petitioner's requests for street banners, when they are able to deny political events to be announced thereon as was alleged in this case. Therefore petitioner need not have applied for such banner permits. The stated reason by the Circuit court in denying petitioner's claim as not being properly before the court because his "proposed banners . . . express political beliefs or greetings, and so do not fall within the guidelines for banners" (App. p. 19) is in clear error and contradicts the decisions of this Court.

There is absolutely no evidence that petitioner has waived or forfeited his facial challenge by failure to apply for use of any of the fora under the control of the City in this case.

## VI. BROAD LICENSING DISCRETION TO REQUIRE FEES AND INSURANCE

Not only is the licensing discretion of municipal authorities overly broad regarding the issuance of street banner permits, but that overly broad discretion was exercised over other fora in which this petitioner would have exercised First Amendment rights.

Upon inquiry about use of the Barnsdall civic auditorium, petitioner was informed orally and in writing that "political" meetings or functions would not be allowed. Apart from an impermissible content distinction the restriction against "political" events allows overly broad discretion to authorities over the exercise of speech in a public forum in deciding what is political.

Moreover, the respondents' bold claim that rental may be "denied if the content is deemed unsuitable" is a clear content-based criteria and unconstitutional. (Plaintiff's Exhibit 135, P. 49, 52 Excerpts.)

Likewise the impermissible content distinctions and overly broad licensing discretion given to police in parks around Los Angeles City Hall, allowing them to detain and handcuff persons with leaflets that are in "bad taste" or "impact negatively on the City of Los Angeles" cannot pass constitutional muster.

Nor may Federal Courts allow the park director to waive fees and insurance for City sponsored groups to use the bandstand-kiosko in a public park merely because, "I deem it reasonable to require you to obtain such insurance." That discretion on who is city sponsored and a personal decision without even guidelines is not just broad licensing discretion, but

unbridled discretion vested in the decisionmaker, prohibited by this Court.

In *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1206 (1991) the Eleventh Circuit has recently ruled that although Florida may have a legitimate interest in protecting itself from liability for injuries associated with the use of news vending machines and that avoiding such liability was a legitimate concern, it reversed the District Court's finding on reasonableness for two reasons: there was no showing or evidence establishing such a need and more troubling was the fact that the insurance requirement was required of some vendors and not of others. That unbridled discretion is precisely what was alleged by petitioner in this case when the respondents required him to obtain insurance and post fees to use the bandstand (kiosko) in El Pueblo Park, and that City sponsored persons and groups were allowed use of the facility without such posting of fees and insurance. (Defendants' Exhibit 3 and 4 at trial, P. 30 and 31 Excerpts)

This Court in *Forsyth County, Georgia v. the Nationalist Movement*, ____ U.S. ____, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992) held that allowing the government to vary the fee for assembling or parading to reflect the costs or maintaining public order, violated the free speech guarantees of the First Amendment as vesting unbridled discretion in a governmental official.

## VII. PRIOR RESTRAINT

In *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 555-559, 75 S. Ct. 1239, 1244-1246, 43 L.Ed.2d 448 (1975) this Court ruled that a municipal

theater was a public forum and that the city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints. In this case at bench the municipal Barnsdall theater is a public forum and political events cannot be excluded without running afoul of constitutional safeguards. The City of Los Angeles and no city may designate a theater only for cultural events and exclude political events.

The imposition of prior restraint on speech or the distribution of literature in public areas has been consistently rejected, except to the extent such restraints sought to control time, place, and circumstances rather than content. (See *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286, 33 L.Ed.2d 212 (1972); *Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954, 83 L.Ed 1423 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949 (1939)). Yet the City of Los Angeles has blatantly required that petitioner submit an audio tape of his proposed expression prior to the granting of permission to use the Triforium area/amphitheater in a public park near Los Angeles City Hall.

The presumption against prior restraints has been enshrined in our law for more than 50 years. (See *Near v. Minnesota*, 283 U.S. 697 (1931). Prior restraints are permissible in only the rarest of circumstances, such as imminent threat to national security. *Id.*, at 716. See also *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L.Ed.2d 822 (1971).

Petitioner's speech poses no such imminent threat to national security.

## PHYSICAL RESTRAINT--SEIZURE

Although the Circuit court below found the acts of respondents in enforcing the enacted guidelines on distribution of printed material in El Pueblo Park to be unconstitutional "as applied" and remanded for a determination of damages, that court did not reach the issue of facial unconstitutionality of the policy that is still in effect in that park. More troubling is the inability of the courts below to recognize the severe damages to this petitioner caused by the written policy of the respondents on the distribution of literature in public areas around City Hall. The guidelines allow for investigation, detention, handcuffing and transporting persons who would distribute leaflets that are in bad taste or impact negatively on the City of Los Angeles.

Petitioner alleged that the City followed the written guidelines and he was investigated, detained, handcuffed and transported and there was uncontroverted testimony by the handcuffing officers that they were informed of the policy and were following that policy on the several occasions when they acted to handcuff this petitioner.

A person is seized if under the circumstances a reasonable person would have believed he was not free to leave. The use of physical means to restrain a person's movement is the most obvious form of seizure. See *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S. Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968).

"Any curtailment of a person's liberty by the police must be supported by at least a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440,

110 S. Ct. 2752, 2753, 65 L.Ed.2d 890 (1980) (per curiam).

The articulable suspicion of the police officers in this case was that petitioner was in violation of the policy regarding literature "in bad taste." The failure of the courts below to recognize this egregious deprivation of speech rights in a public forum must be corrected.

## CONCLUSION

For the above reasons petitioner prays that this Court grant the petition for certiorari. The right to communicate in public places is a fundamental right that will be severely damaged if the opinion of the United States Court of Appeals for the Ninth Circuit is allowed to become law in this Circuit and in other Circuits. That opinion directly contradicts this Court's past decisions on the First Amendment privileges of all persons.

Respectfully submitted,

JACK GERRITSEN, Pro se

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|---|
| JACK GERRITSEN, | ) | No. 91-55470 |
| | ) | D.C. No. |
| Plaintiff-Appellant, | ) | CV-87-1861-WMB |
| | ) | |
| v. | ) | |
| | ) | |
| CITY OF LOS ANGELES, et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court
for the Central District of California
William Mathew Byrne, Jr., District Judge, Presiding

| | | |
|---|---|---|
| JACK GERRITSEN, | ) | No. 92-55103 |
| | ) | D.C. No. |
| Plaintiff-Appellant, | ) | CV-89-6026-WJR |
| | ) | |
| v. | ) | OPINION |
| | ) | |
| CITY OF LOS ANGELES, et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

App. 2

Argued and Submitted
March 3, 1993--Pasadena, California

Filed May 14, 1993

Before: Dorothy W. Nelson, Charles Wiggins, and Edward Leavy, Circuit Judges.

Opinion by Judge D.W. Nelson

## COUNSEL

No. 91-55470: Jack Gerritsen, Monterey Park, California, for the plaintiff-appellant.

Robert Kujima and Janet G. Bogigian, Los Angeles City Attorney's Office, Los Angeles, California, for defendants-appellees City of Los Angeles and its employees.

No. 92-55103: Jack Gerritsen, Monterey Park, California, for the plaintiff-appellant.

Ronald T. Pohl and Janet G. Bogigian, Los Angeles City Attorney's Office, Los Angeles, California, for defendants-appellees City of Los Angeles and its employees.

## OPINION

D.W. NELSON, Circuit Judge:

### I. *OVERVIEW*

Appellant Jack Gerritsen ("Gerritsen") has strongly

held opinions about the Mexican government and United States-Mexico relations. Gerritsen has sought to express these views by distributing literature, giving speeches, organizing rallies, and utilizing a variety of other protest activities throughout the greater Los Angeles area.

Appearing *pro se* below and before this court, Gerritsen brought these two actions under 42 U.S.C. § 1983 (1988) for deprivation of his First Amendment rights.[1] The suits culminated in judgments for the defendants-appellees--the City of Los Angeles ("the City") and several of its employees--after separate bench trials.[2] The cases have been consolidated on appeal as

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[1] Section 1983, in relevant part, reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." 42 U.S.C. § 1983 (1988).

The First Amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . .." The Due Process Clause of the Fourteenth Amendment has been construed to extend the Bill of Rights to the States, e.g. *Stromberg v. California*, 283 U.S. 359 (1931); *Lovell v. Griffin*, 303 U.S. 444 (1938).

[2] Although this appeal involves only defendants the City of Los Angles and its employees, there were initially more than two dozen defendants in these two cases.

In No. 91-55470, the initial group of defendants included several municipalities (and their employees) and two private security companies (and their employees). Most of the defendants were dismissed before trial. upon their own motions. One of the security companies reached a pre-trial settlement with Gerritsen and was subsequently dismissed. Gerritsen prevailed against Trojan Security Company, several of its employees, the City of Bell, and a Bell

they raise similar issues and involve many of the same defendants.

We affirm the district court as to most of Gerritsen's claims, but reverse as to those involving the City's policies on handbill distribution in a public park. We hold that the City's ban on handbill distribution in certain areas of a public park and its permit scheme for handbill distribution in other areas of the park are not valid time, place or manner restrictions on protected speech in a public forum.

## II. *FACTUAL AND PROCEDURAL BACKGROUND*

Each year approximately two million people visit El Pueblo de Los Angeles State Historic Park ("El Pueblo Park"), located in downtown Los Angeles. The park was established to commemorate the City's Mexican heritage and recognize its present-day Mexican-origin population. In addition to a plaza area with an open-air bandstand, El Pueblo Park contains the Olvera Street shopping and dining areas with 78 businesses, the Plaza Catholic Church and the Biscailuz Building which houses the Mexican Consulate. The City's Board of Recreation and Parks sets policy for the park and controls its day-to-day operations.

Gerritsen has distributed his literature and made speeches in a variety of cities and parks in the Los

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Company, several of its employees, the City of Bell, and a Bell police officer.

Case No. 92-55103 initially involved the City of Los Angeles, several of its employees, and a third security company. The defendant Coleman Security Service, Inc. failed to respond to the complaint, and the court entered a default against them.

sites because of its many Mexican American and Mexican visitors. He believes this audience is more likely than others to be receptive to his message critical of policies of the Mexican government and the United States' relationship with Mexico. He estimates that between 1986 and 1991, the period during which he claims his rights were violated by the City and city officials, he visited the park 400 times and distributed more than 50,000 handbills in El Pueblo Park.[3]

During Gerritsen's visits to the park, he has had a number of conflicts with employees of the park's security force, park administrators, officers of the Los Angeles Police Department, and representatives of the Mexican Consulate.[4] Gerritsen testified to numerous incidents of harassment, verbal and physical intimidation, detention, arrest, and physical assault by park security guards, Mexican Consulate security officers, and Los Angeles police officers. At trial, the City argued that its official policy was not to enforce the policies, claimed that all of these altercations were provoked by Gerritsen, and portrayed Gerritsen as an uncontrollable protestor.

On August 11, 1983, in response to conflicts between Gerritsen and park administrators and security

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[3] Most of these handbills were letter-sized, photocopied sheets with typewritten text. Gerritsen usually protests as an individual, but he also heads an organization, the Association for Democracy in Mexico. Many of the handbills contain the Association's name and list Gerritsen as a contact person.

[4] Gerritsen also sued several officers of the Mexican Consulate in a case recently dismissed by this court. *See Gerritsen v. Consulado General de Mexico, et al.*, No. 92-55226, filed April 2, 1993.

between Gerritsen and park administrators and security guards, the City's Board of Recreation and Parks Commission enacted provisions regarding handbill distribution in El Pueblo Park.[5] Prior to the enactment of this policy, there was no formal policy concerning the distribution of literature in the park. The City concedes that these provisions were prompted solely by Gerritsen's political activity in the park and were the result of consultations between El Pueblo Park Director Jerry Smart and the City Attorney's office. The guidelines have never been repealed.

The 1983 guidelines contain two basic policies. First, the so-called blue line policy prohibits *all* handbill distribution in certain areas of the park (indicated by blue demarcations on the pavement). These include two of the park's most popular areas--the area around the Mexican Consulate and the Olvera Street merchants area. The second policy establishes a permit scheme for limited handbill distribution in other areas of the park. According to the regulations, "the Park Director shall issue a permit immediately on proper application" unless one of five specified grounds for denial exist.[6] If the director denies the permit, he is required to inform the

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[5] The provisions formally are titled "Guidelines for Solicitation of Donations and the Distribution of Printed Material at El Pueblo de Los Angeles Sate Historic Park:. *See* Appendix A.

[6] The listed grounds for permit denial are the following: (1) a prior permit has been granted for the same area, which is too small for multiple permits; (2) a danger to public health or safety will result; (3) the applicant desires too many persons to engage in the proposed distribution; (4) distribution is prohibited in the target location (e.g., the blue-line areas); (5) the activity would constitute a violation of local, state, or federal law.

denial.

Both park director Jerry Smart and Gerritsen testified at trial that Smart informed Gerritsen of the new rules regarding handbill distribution in the park shortly after their passage. About a month later, Gerritsen filed the first of hundreds of applications for permits to distribute literature. In some cases Gerritsen received permits, but in other cases he was denied permission to distribute literature. Sometimes the denials were based upon one of the reasons in the written Guidelines; on other occasions, the director hand-wrote a reason for denying the permit which did not appear on the permit form. Gerritsen testified that he initially did not distribute literature in the blue-line areas, but that he later distributed handbills throughout the park, regardless of whether he received permission to do so. He stated that he would have distributed even more handbills had the permit policy not been in existence.

Although the City Attorney's office helped draft the provisions, that office later advised park officials not to enforce either the blue-line ban or the permit scheme. The parties dispute exactly when the City ceased enforcing the policies. In the first trial, park director Smart testified that he attempted to enforce the blue-line ban into early 1984. In the second trial. Smart testified that he stopped enforcing the blue-line ban within two months of the Board's enactment of the provisions, sometime in October 1983. Gerritsen contends that park officials continued to enforce the blue-line ban well into 1986 and that, even after that time, they "unofficially" enforced the provision.

The permit provision was in effect considerably longer than the blue-line policy. Park director Smart

longer than the blue-line policy. Park director Smart testified that the permit policy was in effect until "sometime in 1985." He also testified, however, that even after the permit policy was "officially" withdrawn, the City Attorney directed him to keep permit applications on file. Smart continued to accept Gerritsen's applications for permits--and continued to approve or deny them--throughout 1988. Gerritsen testified that, even after Smart directed park security guards to stop enforcing the permit policy, the guards continued to harass Gerritsen about his political activities and detained him on more than 20 occasions:

> These permit denials were enforced on many occasions by security guards. On numerous occasions they would approach me and ask me for a permit. When I could not show them a granted permit, they would tell me to get out of the park or attempt to arrest me or handcuff me . . .

In addition to expressing political views by distributing literature at El Pueblo Park, Gerritsen sought to use street banners to convey his views. Between 1986 and 1989, Gerritsen submitted as many as 50 applications to the City to hang banners across various streets, mostly in the downtown area. The proposed banners included a variety of messages: "Mexico--World Class Drug Pusher," "Viva la Revolucion;" "City Hall Sucks;" "Gay Liberation;" "Merry Christmas, Happy New Year," "This Space Censored by the City of Los Angeles;" and, on one occasion, a completely blank banner. The City, through its Bureau of Street Maintenance has discretion to grant or deny permits, denied each of Gerritsen's banner permit applications.

Los Angeles Municipal Code § 62.132(m), which

hanging of street banners in the city. The City requires any person or organization wishing to hang a non-commercial banner across a city street to apply for a permit and post an insurance bond. The 1986 amendments allow only banners which announce "community, charitable and nonprofit events which serve a civic and public interest." A designated official in the City's Bureau of Street Maintenance has discretion to grant or deny permits, subject to review by the Board of Public Works.

In 1987 and 1989 Gerritsen brought these Section 1983 claims against the City and numerous other defendants seeking compensatory damages.[7] Both suits resulted in bench trials (at which Gerritsen represented himself) and judgments in favor of the City and its employees. Both district courts found that the El Pueblo Park guidelines were not enforced by the City and, thus, that they were not applied to Gerritsen. Thus, neither court reached the merits of Gerritsen's claim that the blue-line ban and the permit scheme are unconstitutional. Gerritsen timely appealed to this court, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

## III. *STANDARD OF REVIEW*

This court reviews the district court's factual findings for clear error. *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1405 (9th Cir.), *cert. denied*, 113 S.Ct. 210 (1992). We review the district court's legal conclusions de novo. *United States v. McConnery*, 728 F.2d 1195, 1201 (9th Cir.)(en banc).

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[7] Gerritsen did not request injunctive relief or punitive damages.

*McConnery*, 728 F.2d 1195, 1201 (9th Cir.)(en banc). *cert. denied*, 469 U.S. 824 (1984). However, we review First Amendment questions de novo since they present mixed questions of law and fact, "requir[ing] us to apply principles of First Amendment jurisprudence to the specific facts of this case." *ACORN v. Phoenix*, 798 F.2d 1260, 1263 (9th Cir. 1986); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227, n. 1 (9th Cir. 1990).

## IV. *THE HANDBILL DISTRIBUTION GUIDELINES*

### A. *Was the policy applied to Gerritsen?*

Gerritsen argues that the City's policy regarding the distribution of handbills in El Pueblo Park is unconstitutional as applied to him. Specifically, he argues that neither the blue-line ban nor the permit scheme are valid time, place or manner restrictions on protected speech in public forums. The City, on the other hand, urges this court to uphold both district courts' findings that the El Pueblo Park regulations never were applied to Gerritsen, thereby voiding his *as applied* claim of unconstitutionality.[8]

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[8] On appeal, Gerritsen also makes a facial challenge to the El Pueblo Park guidelines. A plaintiff may bring a facial challenge "[w]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity . . .." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 [1988]; *see also Freedom v. Maryland*, 380 U.S. 51, 56 (1965); *Gaudiya Vaishnava Society v. San Francisco*, 952 F.2d 1059, 1062 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1951 (1992). We do not reach the issue of facial unconstitutionality, because we find, as an initial matter, that the guidelines were unconstitutional *as applied* to Gerritsen.

were not enforced against Gerritsen, and, as a result, that he was precluded from making an as applied challenge to their constitutionality. Yet the record conclusively supports Gerritsen's claim that the El Pueblo Park rules were applied to him for at least some period of time. Thus, we find that the district courts erred in concluding that the rules were not applied to Gerritsen.

The City conceded at trial that the handbill rules were aimed specifically at Gerritsen's activities in the park and that, immediately upon their enactment in early August, 1983, park officials informed Gerritsen of them. At some later point, the City Attorney's office directed park director Smart and those working with him to cease enforcing the policies. While Smart's testimony about the exact dates when he stopped enforcing the policy was inconsistent, the record indicates that both prongs of the policy were applied to Gerritsen for at least some period of time.[9]

Smart testified that the blue-line ban was enforced for between two and six months and that the permit policy was enforced for nearly two years. In addition to testimony about when he was directed to "stop enforcing" the policy, Smart testified that the City Attorney instructed him to keep permit applications well into 1986 and that he complied with this order. Moreover, between enactment of the guidelines in 1983 and 1988, Smart accepted and either approved or denied dozens of Gerritsen's permit applications.

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[9] Park Director Smart testified at both trials, but gave different dates for the enforcement period at each trial. The minimum period for which he claimed to have enforced the handbill regulations was two months, and the maximum period that he testified portions of it were enforced was two years.

Gerritsen's permit applications.

For his part, Gerritsen argued that the park rules on handbill distribution were tacitly enforced even after Smart directed his subordinates and park security guards not to enforce the policy. Gerritsen testified that park officials' and security guards' enforcement of the policy towards him had a chilling effect on his protest activity. Although it is true that Gerritsen continued to visit the park and distribute his political literature (in both blue-line and other areas) he testified that he did not distribute as frequently as he would have absent the park guidelines. In short, the evidence indicates that the El Pueblo Park regulations were applied to Gerritsen for at least some period of time and that the district courts' findings to the contrary are clearly erroneous.

B. *Constitutionality of the blue-line ban*

In evaluating an as applied First Amendment challenge, we must decide whether or not the plaintiff's activities are protected speech or conduct, whether the government restriction occurs in a public or non-public forum, and whether or not the restriction is a valid time, place or manner regulation. *See United States v. Grace*, 461 U.S. 171, 176-182 (1983).

Gerritsen's speech clearly is protected by the First Amendment--he attempted to distribute handbills discussing his political beliefs. In deciding whether or not the blue-line ban involved a public forum, the record reflects that the blue-line ban prohibited handbill distribution in two areas of the park: the Olvera Street merchants area and the sidewalk areas immediately surrounding the Mexican Consulate. Since public parks such as El Pueblo represent the quintessential public

*Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *see also Kreisner v. San Diego*, No. 90-55354 (9th Cir., filed March 3, 1993), slip op. at 1710 ("Traditional public forums, such as parks and public streets, however, are open to all manner of speech, subject only to reasonable time, place and manner restrictions.").

The City argues that the blue-line areas are distinct from the rest of the park, which they concede is a public forum. It claims that the Olvera Street area is a distinctive section of the park, with a unique historic and cultural atmosphere which is designed to foster commercial exchange. It claims that the area around the Mexican Consulate is semi-private in nature and that it has particular functions to carry out which necessitate separation from activities in other areas of the park. We find these arguments unconvincing. While the Olvera Street area may have a special ambience, it is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status. Indeed, to many visitors, Olvera Street is the heart of El Pueblo Park. Similarly, the walkways and sidewalks leading up to and surrounding the Mexican Consulate are no different from others in the park. We find that the blue-line areas are indistinguishable from the park as a whole, and, thus, that these areas constitute a public forum.

In this respect, our conclusion is consistent with several where the Supreme Court and the lower federal courts have found sections of public forums to be one and the same with the larger, undisputed public forum in which they exist. *See Boos v. Barry*, 485 U.S. 312, 318 (1988) (sidewalks are traditional public forums and sidewalks surrounding the Soviet and Nicaraguan

embassies are indistinguishable from other public sidewalks); *Grace*, 461 U.S. at 177-78 (sidewalks are traditional public forum and sidewalks leading up to United States Supreme Court building are indistinguishable from other public sidewalks); *see also Henderson v. Lujan*, 964 F.2d 1179, 1182-83 (D.C. Cir. 1992)(sidewalks near Vietnam Memorial are indistinguishable from other city sidewalks and so are public forum for First Amendment purposes); and, *Naturist Society v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992)(parks are traditional public forum and beach area of state park is part of larger park and therefore a public forum).

Given that the blue-line areas are a public forum, the ban on handbill distribution must be a valid time, place or manner restriction if it is to pass constitutional muster. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Such a restriction must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave ample alternatives of communication. *Id.* at 791; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The ban meets the first criterion, since it prohibits *all* handbills without regard to their content. It also meets the third criterion since there are ample alternative channels of communication: Gerritsen could leaflet in other areas of the park or, presumably, he could use methods other than handbills to express his political views.

The more difficult question is whether the blue-line ban is narrowly tailored to achieve a significant government interest. The City advances three significant government interests behind the blue-line ban: (1) preserving the historic quality of the Olvera Street area;

(2) maintaining a calm, secure environment for the Consulate and its visitors; (3) avoiding congestion in these often crowded areas. We concede that these interests are substantial, but we question the City's manner of achieving them. While the ban is narrow in its reach, in that it affects only these specific areas, courts rarely have upheld complete bans on a category of First Amendment expression.

In *Grace*, the Court noted that the government interest in protecting the Supreme Court Building and maintaining the decorum of the area were important, but questioned

> whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes. There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds. As we have said, the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are not normally open to the conduct that is at issue here and that § 13k forbids. A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the sidewalks surrounding the building than on any other sidewalks in the city. Accordingly, § 13k cannot be justified on this basis.

*Grace*, 461 U.S. at 182.

Similarly, in the case at bar, the blue-line areas

Similarly, in the case at bar, the blue-line areas are indistinguishable from other parts of the park. Nor is there evidence that Gerritsen's handbill distribution interfered with operation of these park areas. to the extent that City officials sought to curtail unprotected activity in the blue-line areas (such as disruption of other legitimate park activities, the business of the Mexican Consulate, or visitors' enjoyment of the park), the *total* ban on handbill distribution is substantially broader than necessary. Moreover, City officials already had in place regulations to prevent these behaviors, as indicated by the occasions (some of which are described later in this opinion) when park officials did not hesitate to enforce laws aimed at Gerritsen's unprotected, disruptive conduct. Thus, a total ban on this activity in these areas is unjustified.

C. *Constitutionality of the permit scheme*

Consistent with our analysis of the blue-line ban portion of the El Pueblo Park guidelines, in deciding whether the permit prong is constitutional, we must make three initial determinations: (1) whether or not the plaintiff's activities are protected speech or conduct, (2) whether the government restriction occurs in a public or non-public forum, and (3) whether or not the restriction is a valid time, place or manner regulation. We already have answered the first two questions--Gerritsen's activity is protected by the First Amendment and the park is a public forum.

Thus, in order to survive, the permit scheme must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample

at 45; *Grace*, 461 U.S. at 177. The permit scheme is content neutral in that it applies across the board to all types of handbills. While a person who is denied a permit to distribute handbills would be foreclosed from that method of communication, he or she would still have the option of engaging in other forms of expressive activity.

In determining whether a permit scheme is narrowly tailored to serve a significant government interest, we look to the "fit" between the state's regulation and the stated purposes in making this determination. *Cincinnati v. Discovery Network, Inc.*, 61 U.S.L.W. 4272, 4273 (filed March 24, 1993) (citing *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989)). Unfortunately, we are at a loss to discern any *significant* government interest in proposing the permit rule. The record reveals only one express reason for the City's enacting the permit scheme--to make it more difficult for Gerritsen to distribute handbills regarding his political beliefs.

We hold that this purpose is not a significant government interest. Moreover, it is not a legitimate government interest--it is precisely the type of viewpoint censorship which the Constitution seeks to prevent. The Supreme Court and this court have made it clear that certain government interests are impermissible--and the purpose of curtailing political speech which is controversial or anti-government is among these.[10] *See*

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[10] We note that the impermissible government purpose here--to discourage Gerritsen from expressing his views in the park--comes close to destroying the permit scheme's content neutrality. Although the scheme is content neutral on its face, this purpose may convert it

*Boos*, 485 U.S. at 318 ("classically political speech" such as the anti-Soviet and anti-Nicaraguan speech plaintiffs here seek to express deserves special review); *Bay Area Peace Navy*, 914 F.2d at 1232 (Tang, J., concurring) ("courts must be particularly wary of how the government regulates those objecting to the government's speech").

Since we cannot discern a significant government interest behind the permit scheme, the City cannot show that it is narrowly tailored to meet such an interest. Thus, the permit prong of the El Pueblo Park guidelines fails the test for a valid time, place or manner restriction.

## V. *THE BANNER REGULATION*

Gerritsen claims that his First Amendment rights were violated by the City's regulation governing the hanging of message-bearing banners across city streets. As a threshold question, we must determine whether or not this regulation was applied to Gerritsen, since Gerritsen makes only an *as applied* challenge to the regulation. While one district court found that the regulation was applied, the other found that it was not, concluding that Gerritsen never made a valid application for a banner permit because he never submitted an insurance bond.

The record indicates that it was the City's practice

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to a viewpoint-based regulation. *See Ward*, 491 U.S. at 791 ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'")(quoting *Clark*, 468 U.S. at 293).

to consider applications without the bond, with the understanding that, upon approval, the applicant would produce the bond before being allowed to hang the banner. Indeed, Gerritsen's cross-examination of Senior Street Use Inspector David Torrez revealed that almost all banners were hung by one of a few already-bonded companies with whom the applying party contracted. Often, the applying party would contract the company *after* gaining the City's approval for their message, as Gerritsen testified he intended to do. Torrez' and Gerritsen's testimony leads us to conclude that Gerritsen's failure to submit the bond does not invalidate his constitutional challenge. Thus, the district court erred in reaching its conclusion.

We find, however, that the banner regulation was not applied to Gerritsen for another reason, and, thus, that his constitutional claim is not properly before this court. The regulation restricts banners to those *announcing events* in the civic or public interest. Yet none of the applications Gerritsen submitted announced events of any sort. His proposed banners included the following: "Mexico--World Class Drug Pusher," "City Hall Sucks," and, "Merry Christmas, Happy New Year." Like all of the proposed banners for which Gerritsen sought permits, these messages express political beliefs or greetings, and so they do not fall within the guidelines for banners.

## VI. *THE OTHER CLAIMS*

Gerritsen raises several other claims on appeal, on which we affirm the district court. He challenges the constitutional validity of El Pueblo Park's requirement for use of its bandstand and sound system. The Park requires potential users to post a bond for liability resulting from the unanticipated effects of such an event

on park visitors. Gerritsen claims that the bond requirement was applied to him unfairly. This regulation infringes on protected speech in a public forum, so, in order to survive this court's review, it must be content-neutral, be narrowly tailored to meet a significant government interest and leave ample alternatives for expression. *Ward*, 491 U.S. at 782-83.

The bond requirement is content-neutral in that it is applied to every applicant regardless of the nature of the expression or content of the message they wish to convey. It furthers a significant government interest: the protection and maintenance of an expensive sound system. It is narrowly tailored to meet that goal by requiring most applicants to post the bond.[11] Finally, the bond requirement does not completely close off an applicants's opportunities for expressive activity; an applicant who cannot afford to or does not want to post the bond may conduct many other types of expressive activity in the park.

Gerritsen also challenges the City's policy to restrict use of the Barnsdall Gallery Theater to art and cultural presentations. The City-owned and operated theater is located in a public park, but use of the theater is administered through the Cultural Affairs Department. Gerritsen makes an applied challenge to the ban on political events in the theater. After hearing testimony from the theater director and Gerritsen, the district court found that Gerritsen never made a complete application to

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[11] While it is true that the City exempts some users from the bond requirement, this does not upset the reasonableness of the fit between the purpose of protecting the equipment and requiring a bond.

use the theater. This finding is not clearly erroneous.

Gerritsen argues that City officials deprived him of his First Amendment rights by denying him access to the Triforium Stage. The Triforium is an outdoor amphitheater located in a public park; it is owned and operated by the City. The district court properly rejected Gerritsen's as applied challenge to the City's regulations for use of the stage because he did not file an application to use the stage. The record supports this finding: Gerritsen only inquired in the procedure for reserving the stage but actually never applied to use it.

Two of Gerritsen's claims on appeal concern the constitutionality of stops and detentions of him by the Los Angeles Police Department. On May 7, 1989, Gerritsen visited Lincoln Park to distribute handbills about his political beliefs. The park was filled with visitors gathered to celebrate "Cinco de Mayo," a Mexican holiday often celebrated in this country. The district court found that Gerritsen disrupted speakers at the event and caused a public nuisance generally. It also found that the police properly responded to the event's organizer's complaints about Gerritsen. Although Gerritsen's testimony conflicted with others on the scene that day, the district court's finding is not clearly erroneous.

On September 15, 1989, police detained Gerritsen after receiving complaints from private citizens and organizers of the El Grito Day celebration on the south lawn area near City Hall. The district court found that Gerritsen's conduct was not protected by the First Amendment and that the police were justified in detaining him. Although Gerritsen's testimony contradicted that of the defense witnesses, the trier of fact found their

testimony more credible.

Gerritsen's final claim is a facial challenge to the City's prohibition of signs on city property with the exemption for real estate signs.[12] The City bans all signs on its property except for real estate signs. Government ownership of property alone does not convert it to a public forum. There is no evidence to suggest that the government has designated its property as a public forum. Thus, the regulation will be upheld if it is viewpoint neutral, narrowly drawn to serve a legitimate government purpose, and leaves open other channels of communication. *Vincent*, 466 U.S. at 815. The regulation excludes all *noncommercial* signs, making it neutral as to political views. It serves a variety of legitimate government purposes, and there is no evidence to suggest that it is drawn any broader than necessary to do so. Finally, it leaves a myriad of other expressive opportunities to those wishing to express their noncommercial views. We find the City's sign ordinance constitutional.

## VII. *CONCLUSION*

In sum, we affirm the district court as to the bulk of Gerritsen's claims. As to the city's El Pueblo Park policies, we hold that these regulations violate the First Amendment. The blue-line ban is not narrowly tailored; the city failed to justify the need for a complete prohibition on handbill distribution in the blue-line areas. The permit scheme fails because the city's purpose in

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[12] Although the district court neglected to address this claim, in the interests of judicial economy, we reach the merits of it under a de novo review, as we would had the district court reached the question.

enacting the scheme--to discourage Gerritsen's protest activities in the park--was invalid. We remand these cases to the district court so that it may determine Gerritsen's damages against the City for violations of his constitutional rights.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

**Appendix:**

APPENDIX A: Guidelines for Solicitation of Donations and Distribution of Printed Matter at El Pueblo State Historic Park. Enacted August 11, 1983 by the Los Angeles Board of Recreation and Parks Commission.

*FINDINGS IN SUPPORT OF GUIDELINES FOR SOLICITATION OF DONATIONS AND DISTRIBUTION OF PRINTED MATTER AT EL PUEBLO STATE HISTORIC PARK*

1. Pursuant to the City of Los Angeles City Charter (hereinafter "Charter") section 171, the Department of Recreation and Parks (hereinafter "Department") has the obligation to shall [sic] maintain, operate and control all parks of the City of Los Angeles. El Pueblo State Historic Park is included [sic] within the jurisdiction of the Department by virtue of a joint powers agreement among the City of Los Angeles, County of

Los Angeles and State of California, enacted by the City Council and signed by Mayor Tom Bradley on February 25, 1974, and pursuant to the authority of Government Code section 6500 *et. seq.*

2. Pursuant to Charter, § 70, the Department is under the management and control of the Board of Recreation and Park Commissioners (hereinafter "Board").

3. The Board considers Olvera Street, Sanchez Street, the parking lots and the area immediately adjacent to the Mexican Consulate (see areas marked on Exhibit "1") to be vital to the promotion and accommodation of the historic and commemorative purposes of the facility known as El Pueblo State Historic Park.

4. El Pueblo Sate Historic Park currently accommodates approximately 2 million visitors a year who come to the facility because of its historic and commemorative importance relative to Mexican history in Los Angeles, because of the Mexican Consulate, and because of the Plaza Catholic Church.

5. It is the objective of the Board to keep Olvera Street, Sanchez Street, the parking lot and the area immediately adjacent to the Mexican Consulate as free as possible from congestion and obstruction as an aid to the visitors to the facility.

6. In recognition of its Charter duty to accommodate and promote public recreation and uses incidental thereto, the Board determines that due to historic significance of the facility, no portion of Olvera Street, Sanchez Street, the parking lots and the area immediately adjacent to the Mexican Consulate shall be

utilized for a purpose not related to the promotion and accommodation of the historic landmark.

7. The Board finds that those who would seek to distribute or solicit donations will substantially contribute to the congestion at the foregoing sites and such activities are not compatible with the character and function of Olvera Street, the parking lots and the area immediately adjacent to the Mexican Consulate. Further, these sites are not a public forum.

8. In recognition of the fact that certain areas of the facility will accommodate solicitation of donations and distribution of literature, the Board adopts the attached guidelines.

*GUIDELINES FOR SOLICITATION OF DONATIONS AND DISTRIBUTION OF PRINTED MATTER AT EL PUEBLO STATE HISTORIC PARK*

(a) The solicitation of donations or distribution of printed matter is permitted within park areas, provided a permit to do so has been issued by the Park Director.

(b) Any application for such a permit shall set forth the name of the applicant; the name of the organization, if any; the date, time, duration, and location of the proposed solicitation or distribution; and the number of participants.

(c) The Park Director shall issue a permit immediately on proper application unless:

(1) A prior application for a permit for the same time and location has been made and

the activities authorized by that permit do not reasonably permit multiple occupancy of the particular area; or

(2) The sale or distribution will present a clear and present danger to the public health or safety; or

(3) The number of persons engaged in the sale or distribution exceeds the number that can reasonably be accommodated in the particular location applied for; or

(4) The location applied for has been designated as not available for the solicitation of donations or distribution of printed matter; or

(5) The activity would constitute a violation of ny local, state or federal law.

If an applicant for a permit is denied, the applicant shall be so informed in writing, with the reason(s) for the denial clearly set forth.

(d) The Park Director shall designate on a map, which shall be available for inspection in the Office of the Park Director and is attached hereto as Exhibit 1, the locations within the park area that are not available for the solicitation of donations or distribution of printed matter. Locations may be designated as not available only if the area is not a public forum or if the solicitation of donations or distribution of printer matter would:

(1) Cause injury or damage to persons or to park resources; or

(2) Interfere with the areas maintained for historic or commemorative purposes and for which public access is prohibited or restricted to guided tours; or

(3) Unreasonably interfere with interpretive, living history, visitor services, or other program activities or with the administrative functions of El Pueblo state park.

(e) The permit may contain such conditions as are reasonably consistent with protection and use of the park area.

(f) No permit shall be issued for a period in excess of 14 consecutive days, provided that permits may be extended for like periods, upon a new application, unless another applicant has requested use of the same location and multiple occupancy of that location is not reasonably possible.

(g) Persons engaged in the solicitation of donations or distribution of printed matter under this section shall not obstruct or impede pedestrians or vehicles or those disembarking from vehicles, harass park visitors with physical contact or persistent demands, approach persons in line, misrepresent the purposes or affiliations of those engaged in the solicitation or distribution, or misrepresent whether the printed matter is available without cost or donation.

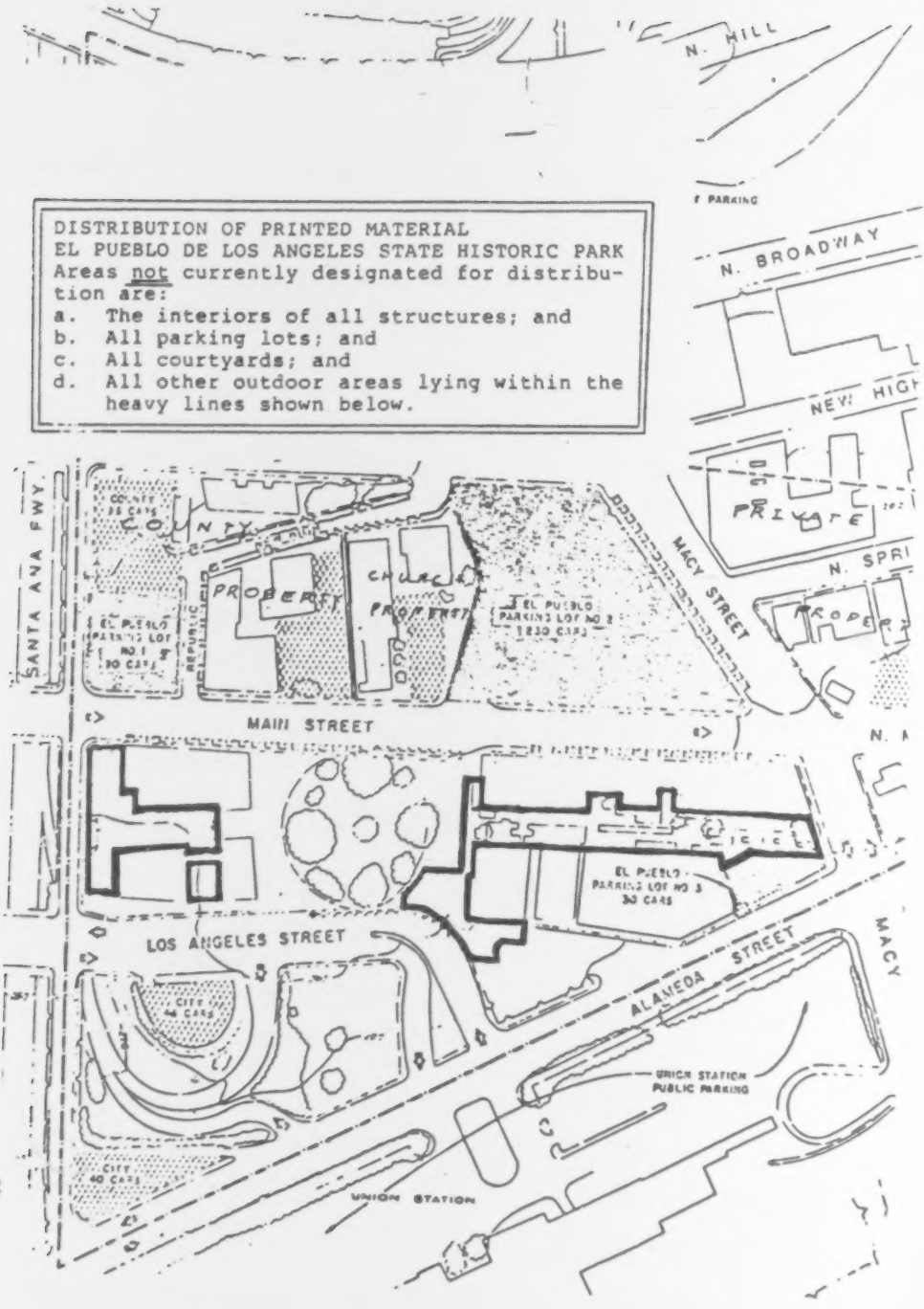
(h) The solicitation of donations or distribution of printed matter without a permit, or in violation of the terms or conditions of the permit, as listed in paragraph (c), or in violation of the terms and conditions of these

guidelines, including paragraph (g), is prohibited.

(i) Any permit may be revoked under any condition listed in paragraph (h). Such revocation shall be made in writing, with the reason(s) for revocation clearly set forth, except under emergency circumstances, when an immediate verbal revocation or suspension may be made, to be followed by written confirmation.

(j) Upon revocation or denial of a permit, the applicant shall have the same opportunity for hearing as set forth in the demonstration guidelines (attached as Exhibit 2).

## Exhibits 1 and 2


DISTRIBUTION OF PRINTED MATERIAL
EL PUEBLO DE LOS ANGELES STATE HISTORIC PARK
Areas not currently designated for distribution are:
a. The interiors of all structures; and
b. All parking lots; and
c. All courtyards; and
d. All other outdoor areas lying within the heavy lines shown below.
N. HILL
N. BROADWAY
SANTA ANA FWY.
MACY STREET
MAIN STREET
LOS ANGELES STREET
ALAMEDA STREET
UNION STATION
UNION STATION PUBLIC PARKING
EL PUEBLO PARKING LOT NO 3 30 CARS

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| JACK GERRITSEN, | ) | CV 87-1861-WMB |
| | ) | |
| Plaintiff, | ) | FINDINGS OF |
| | ) | FACT AND |
| v. | ) | CONCLUSIONS |
| | ) | OF LAW |
| CITY OF LOS ANGELES, et al., | ) | |
| | ) | |
| Defendants. | ) | Filed Feb. 27, 1991 |
| | ) | Entered Feb. 28, 1991 |

This action having come on for trial before the Court and the Court having considered the pleadings and arguments of counsel, now makes the following Findings of Fact and Conclusions of Law.

## FINDING OF FACT

1. The City of Los Angeles, through the Department of Recreation and Parks, enacted guidelines for the distribution of printed materials in and about El Pueblo de Los Angeles State Historic Park (the Park) on August 11, 1983. These guidelines became known as the "blue line" policy.

2. Pursuant to these guidelines, blue lines were painted on the ground within the Park to designate certain areas where printed materials were not to be distributed.

3. The guidelines required a permit to be issued

to allow a person to distribute literature in the Park. The issuance or denial of a permit was subject to the approval of the Park Director. The Park Director in evaluating the permit application had specific factors upon which an approval or denial of a permit could be based.

4. As unjustified as these guidelines might have been, they were never implemented or enforced either in general or against plaintiff.

5. Plaintiff was informed numerous times by Jerry Smart, the Park Director, that no permit was required for the distribution of literature. Mr. Smart did not attempt or cause the plaintiff to be restrained from distributing leaflets because of the lack of a permit.

6. Plaintiff distributed printed materials several times in the Park after August, 1983, without a permit. He was not prevented from doing so and there were no civil or criminal penalties imposed for violation of the blue line policy.

7. The City of Los Angeles contracted with Trojan Security Services to provide security guards to patrol the area from 1983 to 1987. The City of Los Angeles did not exercise direction or control of the security guards in the Park.

8. On August 17, 1986, Los Angeles Police Department officer Tamara Holzer took custody of plaintiff pursuant to a citizen's arrest by Eugenio Rodriguez, an employee of Trojan Security Services.

9. The City of Los Angeles, through the Department of Public Works, Bureau of Street Use, regulated the display of banners on the City's property.

10. From June, 1986 to September, 1986, plaintiff made numerous applications for permits to hang banners. Among the proposed banners were: "Mexico World Class Drug Pusher"; "Merry Christmas"; and "Peace on Earth Goodwill to Men". Plaintiff's banner applications were denied.

11. Plaintiff did not suffer any emotional distress as a result of the actions of the City of Los Angeles, Tamara Holzer, Jerry Smart, Caroline Ascencio, or Bernard McKelvey.

12. Defendants Eugenio Rodriguez, Trojan Security Services, Sergeant Brad Hooper, and the City of Bell have settled with plaintiff and no findings are made as to them.

13. Any Conclusions of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

## CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. While the policy concerning the distribution of leaflets in El Pueblo de Los Angeles Park could infringe upon plaintiff's First Amendment rights, the blue line policy was not enforced and a permit was not required for the distribution of leaflets in the Park. Therefore, the City of Los Angeles did not violate plaintiff's constitutional rights in regards to the distribution of leaflets in El Pueblo de Los Angeles Park.

3. Neither Jerry Smart nor Caroline Ascencio, employees of the City of Los Angeles working at the Park, violated plaintiff's constitutional rights.

4. Trojan Security Services acted as an independent contractor in relation to the City of Los Angeles. The City of Los Angeles is not liable for the acts of Trojan Security Services or its employee, Eugenio Rodriguez.

5. Los Angeles Police Department Officer Holzer was acting pursuant to a valid citizen's arrest and, therefore, no violation of plaintiff's constitutional rights occurred when the officer performed her duty of taking custody of plaintiff. Calif. Penal Code §§ 142, 837, 847.

6. The advertising which plaintiff sought to place on the banners was not protected by the First Amendment.

7. The restriction of banners is a valid exercise of government regulation. Lehman v. City of Shaker Heights, 41 U.S. 298, 41 L.Ed 2d 770, 94 S. Ct. 2714 (1974); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 80 L.Ed.2d 772, 1045 S. Ct. 2118 (1984).

8. The City of Los Angeles did not violate plaintiff's constitutional rights by denying the banner applications. Bernard McKelvey, an employee of the City of Los Angeles, did not violate plaintiff's constitutional rights.

9. Plaintiff's constitutional rights were not violated by the City of Los Angeles or its employees.

DATED: Feb. 26, 1991

_____/S/_____

Wm. Mathew Byrne, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| JACK GERRITSEN, | ) | CV 87-1861-WMB |
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| Plaintiff, | ) | JUDGMENT |
| | ) | |
| v. | ) | |
| | ) | |
| CITY OF LOS ANGELES, et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | Filed Feb. 27, 1991 |
| | ) | Entered Feb. 28, 1991 |

The above-entitled action was tried before the Court and the Court having issued its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that judgment be entered for defendants and against plaintiff.

Each side to bear their own costs.

DATED: February 25, 1991

/S/

Wm. Mathew Byrne, Jr.
United States District Court

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Senior Assistant City Attorney
ROBERT M. KOJIMA, Deputy City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-0733

Attorneys for Defendant
CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| | ) | |
| | ) | Lodged Nov 27, 1991 |
| Defendants. | ) | Filed Dec. 17, 1991 |
| | ) | Entered Dec. 18, 1991 |

This action having come on for trial before the Court and the Court having considered the pleadings and arguments of counsel, now makes the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

1. The City of Los Angeles, through the Department of Recreation and Parks, enacted guidelines for the distribution of printed materials in and about El Pueblo de Los Angeles State Historic Park ("the Park") on August 11, 1983. These guidelines became known as the blue line policy.

2. The guidelines referred to required a permit to be issued to allow a person to distribute literature in the park. The issuance or denial of a permit was subject to the approval of the park director. The park director in evaluating the permit application had specific factors upon which an approval or denial of a permit could be based.

3. The park director, Jerry Smart, informed the plaintiff on several occasions that no permit was required for the distribution of literature in the park. Despite being informed that no permit was required, the plaintiff demanded that a permit be issued to him. Jerry Smart did not attempt, or cause, the plaintiff to be restrained from distributing leaflets because of the lack of a permit. Mr. Smart did not enforce the permit guidelines.

4. The plaintiff distributed printed materials several times in the park after August 1983 without a permit. There were no civil or criminal penalties for violation of the park's guidelines.

5. The park director did not exercise any direction or control over the park security guards. The security guard company was contracted by the park and acted as an independent contractor.

6. On April 28, 1988, the plaintiff was contacted by at least two City of Los Angeles Security Officers in regards to his distribution of leaflets in the Los Angeles Mall. The purpose of contacting the plaintiff was to investigate a complaint that the plaintiff was creating a disturbance. The plaintiff was advised of the complaint, and the officers left.

7. On August 7, 1989, the plaintiff had observed two Los Angeles Security Officers talking to a transient. The plaintiff interfered with the officers investigation despite several requests to leave the area. The plaintiff's conduct necessitated his being detained. The plaintiff was later released after agreeing not to interfere in the future.

8. On September 15, 1989, the plaintiff was creating a disturbance at a public gathering on the south lawn of Los Angeles City Hall. Due to the plaintiff's conduct, Los Angeles Security Officers had to detain plaintiff who was again released after being warned not to disrupt the public ceremonies in progress.

9. In September 1989, the plaintiff contacted William Vestal of the Department of Cultural Affairs, City of Los Angeles in regards to use of an area known as the Triforium. The plaintiff was informed of the guidelines for the use of this area and the application procedure. The plaintiff did not apply for the use of the Triforium nor did he attempt to use the Triforium.

10. In October 1989, the plaintiff contacted Kathy Herbert of the Cultural Affairs Department in regards to the use of the Barnsdall Gallery Theater for a political speech. The plaintiff was informed that the theater is reserved for cultural and artistic performances and not for

political or commercial purposes. Thereafter, the plaintiff made no attempt to use the theater.

11. Between 1988 and 1989, the plaintiff made a number of applications to the City of Los Angeles to post banners from public property. The banner that the plaintiff intended to display would have read "Mexico World Class Drug Pusher". The plaintiff's applications were defective in that he did not provide the cash deposit or the bond.

12. On May 7, 1989, the plaintiff was in El Pueblo de Mexico distributing literature while there were ceremonies in progress. The plaintiff was contacted by Sergeant Alexander Gomez of the Los Angeles Police Department because the plaintiff was disrupting the proceedings. The plaintiff was asked to pass out his leaflets in a peaceful manner. The plaintiff then left the area.

## CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. The plaintiff has not shown by a preponderance of the evidence that he was deprived of his First Amendment privileges.

3. The plaintiff has not proven by a preponderance of the evidence that any of the individually named defendants, Jerry Smart, Robert Bacerra, Reginal Peel, Tammy Young, Henry Dominguez, David Aguirre, Fred Mendoza, Kathy Herbert, William Vestal, or Alexander Gomez violated his civil rights.

4. The plaintiff has not proven by a preponderance of the evidence that any of the individually named defendants acted in a conspiracy to violate his civil rights.

5. The plaintiff has not proven by a preponderance of the evidence that the City of Los Angeles violated his civil rights.

6. The plaintiff has not proven by a preponderance of the evidence that the City of Los Angeles maintained a policy, practice or custom which violated his civil rights.

7. The plaintiff has not proved by a preponderance of the evidence that the regulation of banners by the City of Los Angeles is unconstitutional.

8. Judgment shall be entered accordingly.

DATED: Dec. 17, 1991

_____/S/_____
Honorable Judge William J. Rea